SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5732-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ERIC MENZZOPANE,

Defendant-Appellant.

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Argued April 26, 2017 – Decided July 11, 2017

Before Judges Alvarez, Accurso, and Manahan.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Municipal Appeal No. 2014-10.

Matthew Whalen Reisig argued the cause for appellant (Law Office of Reisig & Associates, LLC, attorneys; Mr. Reisig, on the brief).

Alycia Pollice Beyrouty, Assistant Prosecutor, argued the cause for respondent (Angelo J. Onofri, Mercer County Prosecutor, attorney; Michael D. Grillo, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Eric Menzzopane entered a conditional guilty plea in the Lawrence Township Municipal Court to driving while

intoxicated (DWI), N.J.S.A. 39:4-50, specifically preserving his right to appeal the denial of two motions: for a change of venue and for the recusal of the conflict judge. We now affirm the Law Division's July 10, 2015 decision also denying the motions.

In the beginning of the plea colloquy in the municipal court, counsel said:

> Oh, the defendant at this point Judge is going to enter a conditional guilty plea pursuant to New Jersey Court Rule 7:6-2C which provides that the defendant will be pleading guilty, albeit reserving his right to appeal the denial of the motions that the Court denied sua sponte here this morning without hearing argument that the defense wished to offer therein.
>
> . . . .
>
> [W]hile defendant's preserving his right to appeal the Court's pretrial denials of two motions on this morning's date, we'd ask that the motion filed on May 21st, 2014 and the correspondence in lieu of motion dated May 22nd, 2014 be marked for the record and received by the Court as D-1 and D-2 respectively.

Counsel engaged in the following exchange when reviewing the rights defendant was waiving because of his entry of a conditional guilty plea:

> Q. And you're waiving certain constitutional rights.
>
> A. Yes.

> Q. And the Court alluded to this. You're waiving your right to go to trial and/or in this case to go forward on your motion to suppress.
>
> A. Yes.
>
> Q. And you're waiving that right freely, voluntarily and intelligently.
>
> A. Yes, sir.
>
> Q. You're waiving your right to have me confront Sgt. Dimeglio. We had a flavor of that on March 28th, 2014, although I certainly didn't get to ask all of the questions that I wished to do so of Sgt. Dimeglio before that case was terminated.
>
> A. Yes.
>
> Q. And by pleading guilty, you're waiving your constitutional right to have me confront that Sergeant.
>
> A. Yes.

After defendant's sentence, the other motor vehicle charges against him were dismissed, including: failure to maintain lane, N.J.S.A. 39:4-88(b); reckless driving, N.J.S.A. 39:4-96; DWI in a school zone, N.J.S.A. 39:4-50(g); and driving while on the revoked list, N.J.S.A. 39:3-40.

At the earlier March 28, 2014 pretrial suppression hearing, Officer Christopher DiMeglio of the Lawrence Township Police Department testified that the stop occurred on September 21, 2012, at approximately 2:11 a.m. He "observed [defendant's] vehicle

entering the traffic circle at a high rate of speed, high enough that [he could] hear the tires squealing." DiMeglio had been speaking to another motorist he had pulled over when he made the observation. DiMeglio immediately followed, and saw the vehicle proceeding through a red light as the color was changing. He continued to follow, and noticed defendant drove "on the right fog line and then mov[ed] within the lane, right to left."

DiMeglio could not recall if the vehicle "actually touched the double yellow line," however, he saw it move from the right fog line to near the left. He sped up "significantly," but could not estimate the speed at which defendant was traveling.

DiMeglio acknowledged that he did not observe the vehicle for very long and saw it on the fog line only once. On cross-examination, he was questioned regarding the police report he authored and the video recording of the stop.

DiMeglio's report stated that the vehicle had gone over the fog line, but he testified that the vehicle was simply on it. Defense counsel extensively questioned DiMeglio regarding this distinction and his use of the terms "over" and "on."

As cross-examination continued, the municipal court judge interjected, concerned that counsel was being argumentative with the witness, and was otherwise engaging in improper cross-examination. A few minutes later, defense counsel accused the

judge of raising his voice to him, and from the transcript, it appears defense counsel and the judge had a somewhat heated exchange. The defense attorney demanded that the judge recuse himself. The judge acceded to the request, and terminated the hearing to allow for the appointment of a replacement or conflict judge and prosecutor.

In the interim, on April 3, 2014, counsel requested that the municipal prosecutor provide him with DiMeglio's last twenty-five motor vehicle narrative police reports prepared prior to defendant's stop. When no response was received, defendant filed a motion to compel discovery. The parties then met with the conflict judge in chambers, and discussed the matter. The conflict municipal prosecutor asked for an opportunity to review the motion.

On May 19, 2014, defense counsel's law office received a phone call from the deputy court administrator asking if defense counsel's office had received the reports. According to a certification supplied by the attorney who took the call, when asked at whose behest she was calling, the administrator responded that she was calling at the request of the municipal prosecutor. The deputy court administrator also asked if counsel was satisfied with the extent of the discovery provided given that the matter was scheduled for trial at a special sitting on May 23. Two days later, defense counsel filed a motion for disqualification of the

Lawrence Township Municipal Court on the basis of the phone call, essentially a motion for change of venue, arguing that the call violated the concept of separation of powers. See U.S. Const. art. III, § 1; N.J. Const. art. III, ¶ 1.

Also on May 19, in open court, while the conflict judge was presiding in the Trenton Municipal Court, the conflict judge had asked the prosecutor, who was also serving as the conflict prosecutor in this case, "whether or not the discovery had been provided to [defense counsel]."

On May 22, the conflict judge also called defense counsel's office asking if all discovery had been provided as he did not wish to bring the parties to court unnecessarily. At that time, counsel also alleges, the conflict judge stated he had asked a member of court staff to speak with the municipal prosecutor to confirm that discovery had been supplied.

The conflict judge summarily denied defendant's motion for disqualification of the Lawrence Township Municipal Court by way of a brief email. In it he explained that the court administrator's phone call to defense counsel's office was at his request, not that of the municipal prosecutor.

Defendant next submitted a letter seeking the recusal of the conflict judge, claiming that the judge improperly engaged in ex parte communication with the State.

Thereafter, at the next court date, the conflict judge repeated what he had previously said in emails —— that he had asked the conflict prosecutor as to whether discovery had been provided because the court date was a special session scheduled for this particular matter, and he did not wish to bring in the participants unnecessarily. He reiterated that he had called the Lawrence Township Municipal Court and asked the deputy court administrator to reach out to defense counsel because he was on the bench and he would not have the time to do so himself. The conflict judge again explained that the clerk did not speak directly with the prosecutor, that she made the inquiry at the court's direction, and that these were not ex parte communications that were at all consequential, but merely contacts in aid of scheduling. He therefore denied defendants' two motions.

After the judge's ruling, defense counsel asked for the opportunity to make further arguments in addition to those contained in his briefs. His request for further argument was denied, and the judge said again that the motions were denied. He responded to defense counsel's questions regarding his conversation with the prosecutor in open court. The judge added that he did not know if his in-the-courtroom inquiry in the Trenton municipal court was recorded, as the prosecutor was before him on other matters, and that the inquiry "was a simple one sentence

request." After the two motions were denied —— the motion for change of venue and the judge's recusal —— defendant entered his conditional guilty plea.

In the trial de novo in the Law Division, defense counsel commenced argument by stating that "this defendant is before this [c]ourt on two motions for recusal in the Lawrence Township Municipal Court below which were denied without argument, allowed by defendant in pursuit of his own motion, wherein a conditional guilty plea was entered pursuant to Rule 7:6-2(c). That's why we're here today." After arguing that the appeal was focused on the conflict judge's failure to recuse himself or change venue, and being told that the Law Division was preliminarily denying the appeal but would issue a more detailed written decision to that effect later on, counsel and the court engaged in the following discussion on the record:

> [DEFENSE COUNSEL]: It's the motions for recusal, that's plural, that were denied below which compelled defendant to enter a conditional guilty plea pursuant to Rule 7:6-2(c). It is also the --
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> THE COURT: There is no compulsion. There is no finding of compulsion. It was a conditional guilty plea ---
>
> [DEFENSE COUNSEL]: Which he entered ---
>
> THE COURT: With the exception to appeal the issues of recusal.

[DEFENSE COUNSEL]: Okay. As I was speaking, what is also before this [c]ourt, which was not addressed by this [c]ourt, is the record of the aborted truncated never decided motion to suppress because ---

THE COURT: Which you failed to raise below.

[DEFENSE COUNSEL]: That's not true. Pursuant to State versus McLendon,[1] M C L ---

THE COURT: Sir, there is nothing in the record asking on your part for a decision in that matter. You pled guilty, you never sought the motion further, you didn't ask for clarification, and your client entered a guilty plea reserving his right to appeal on the recusal.

[DEFENSE COUNSEL]: You're right as far as you go. But actually I was saying, pursuant to State versus McLendon, we provided to Your Honor for purposes of this [m]unicipal appeal the MVR. And we made argument that the denial of the recusal motions was injurious to defendant's due process rights because there was no basis to stop his motor vehicle in the first place. That is absolutely part of this Municipal appeal.

And pursuant to State versus McLendon, Your Honor can sua sponte consider that which is why we gave you the MVR. And why we provided that transcript to Your Honor which was the previous transcript, which in this record is March 28, 2014. And why I spend in the brief submitted on behalf of this Municipal appeal from pages 18 through 20, argument about the underlying aborted truncated never concluded motion to suppress.

[1] State v. McLendon, 331 N.J. Super. 104 (App. Div. 2000).

> That is my complete answer to Your Honor's inquiry.
>
> THE COURT: All right. I'll provide a written decision covering all the issues in your brief. The appeal in whole is denied. Thank you, Counsel.

In his thorough and cogent analysis, the Law Division judge began by discussing Rule 1:2-1, which is interpreted as prohibiting ex parte communications. He noted that the rule does permit ex parte communication relating "only to ministerial scheduling matters." State v. Morgan, 217 N.J. 1, 15 (2013). The judge also expounded upon the fact that motions for recusal are entrusted to the discretion of the judge to whom they are made, and require a showing of prejudice or potential bias.

The judge found the communications between the recusal judge and the recusal prosecutor were related solely to the judge's ministerial scheduling function, and were not barred by Rule 1:2-1. He added that defendant failed to identify any evidence whatsoever of either bias or prejudice as a result of the communication.

Furthermore, with regard to the motion to suppress issue, the judge distinguished McLendon, supra, 331 N.J. Super. at 104, the case counsel relied upon. There the defendant appealed a DWI conviction after a trial in the municipal court. Id. at 106. The Law Division judge, concerned about the constitutionality of the road block which led to the stop, reversed the conviction and

remanded the matter back to the municipal court for a new trial, at which the constitutionality of the road block would be addressed. Ibid. In that case, however, the remand arose after conviction, not a plea. Ibid. The judge in this case found those circumstances too dissimilar to the ones at hand.

As the judge explained, in this case:

> [t]he defendant made a conscious decision to abandon the motion to suppress. The record is devoid of any suggestion that his waiver was involuntary or that the municipal court improperly denied him the opportunity to raise the suppression issue. Because he has failed to provide any showing [of] good cause, the court declines to address the merits of defendant's suppression motion.

Now on appeal, defendant raises the following points:

> POINT I
> THE LAW DIVISION'S DETERMINATION THAT THE MUNICIPAL COURT JUDGE WAS NOT REQUIRED TO RECUSE HIMSELF UPON DEFENDANT'S MOTION AFTER AN ACKNOWLEDGED EX PARTE COMMUNICATION WITH THE MUNICIPAL PROSECUTOR SHOULD BE REVERSED BY THE APPELLATE DIVISION IN APPLYING THE CORRECT LEGAL STANDARD.
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> POINT I-A
> THE DISCUSSION BETWEEN THE CONFLICT JUDGE AND THE CONFLICT MUNICIPAL PROSECUTOR ON MONDAY, MAY 19, 2014 IN THE TRENTON MUNICIPAL COURT CONSTITUTED AN EX PARTE COMMUNICATION, THE SUBSTANCE OF WHICH IS UNKNOWN.
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> POINT I-B
> THE EX PARTE COMMUNICATION BETWEEN THE CONFLICT JUDGE AND THE CONFLICT MUNICIPAL PROSECUTOR REQUIRED THE FORMER'S RECUSAL AS THE MOTION/TRIAL JUDGE.

POINT I-C
THE CONFLICT JUDGE ERRED BY FAILING TO UTILIZE THE THREE-PERSON TECHNIQUE UNDER N.J.S.A. 2A:15-50 TO DECIDE THE DEFENDANT'S MOTIONS FOR DISQUALIFICATION.

POINT II
THE FACT OF THE IMPROPER EX PARTE COMMUNICATION BETWEEN THE CONFLICT JUDGE AND CONFLICT MUNICIPAL PROSECUTOR IS PARTICULARLY DISTURBING SINCE THE DEFENDANT'S UNDERLYING CASE ON THE CONSTITUTIONALITY OF THE WARRANTLESS MOTOR VEHICLE STOP WAS MERITORIOUS.

We consider the issues raised to be so lacking in merit as to not warrant further discussion in a written opinion, Rule 2:11-3(e)(2), and deny this appeal essentially for the reasons stated by the Law Division judge.

We add only the following. Rule 7:6-2(c) controls the entry of conditional pleas. It states that "a defendant may enter a conditional plea of guilty, reserving on the record the right to appeal from the adverse determination of any specified pretrial motion." In our view, the rule's plain language limits the contours of any such appeals, including this one.

It is apparent from the sections of the transcript that we have quoted that when the conditional plea was entered, defendant specifically waived his right to address the motion to suppress any further, while preserving his right to address the denial of two motions: one for recusal and the other for a change of venue.

Having preserved only those issues, and having gained the benefit of substantial dismissals, it would be inequitable to now reach the suppression motion. This is a very different situation, one in which defendant gained a substantial benefit and deliberately abandoned a claim, than the scenario in McLendon. There, the remand was allowed to allow the defendant to "raise a constitutional issue belatedly asserted, rather than deem it waived because not properly raised." McLendon, supra, 331 N.J. Super. at 109. Here, defendant abandoned his suppression motion.

Affirmed.